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No. 06-101

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY,

Petitioners,

v.

JULIE WILLES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 29.6 i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE MEANING OF "WILLFUL" UNDER SECTION 1681n OF THE FCRA 1

A. The Ninth Circuit's Decision Directly Conflicts with Decisions by Other Circuits 1

B. The Ninth Circuit Clearly Erred in Its Interpretation of the Statutory Term "Willful" 5

C. The Issue of Willfulness Is Properly Before this Court in this Case 7

II. THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE FCRA'S DEFINITION OF "ADVERSE ACTION" WARRANTS A GRANT OF CERTIORARI 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page(s)**

Ausherman v. Bank of Am. Corp., 352 F.3d 896 (4th Cir. 2003) 3

Bryan v. United States, 524 U.S. 184 (1998).....5, 7

Cushman v. Trans Union Corp., 115 F.3d 220 (3d Cir. 1997).....4

Duncan v. Handmaker, 149 F.3d 424 (6th Cir. 1998).....2

Kawaauhau v. Geiger, 523 U.S. 57 (1998).....5

Land v. Dollar, 330 U.S. 731 (1947) 4

Phillips v. Grendahl, 312 F.3d 357 (8th Cir. 2002).....2, 4

Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1986) 3

Reynolds v. Hartford Fin. Servs Group, 416 F.3d 1097 (9th Cir.), *superseded by* 426 F.3d 1020 (9th Cir. 2005), *amended* 435 F.3d 1081 (9th Cir. 2006).....4, 7

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) 7

United States v. Williams, 504 U.S. 36 (1992) 8

Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467 (2002) 8

Wantz v. Experian Info. Solutions, 386 F.3d 829 (7th Cir. 2004).....3

Statutes and Rules **Page(s)**

11 U.S.C. § 523.....5

15 U.S.C. § 1681a.....9

15 U.S.C. § 1681m.....4

15 U.S.C. § 1681n.....*passim*

15 U.S.C. § 1681q.....2, 6

15 U.S.C. § 1681r.....6

Other Authorities **Page(s)**

The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Commission on Banking, Housing, and Urban Affairs, 108th Cong., 529 (2003) 10

1A Lee R. Russ et al., *Couch on Insurance* (3d ed. 2005).....9

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE MEANING OF "WILLFUL" UNDER SECTION 1681n OF THE FCRA

A. The Ninth Circuit's Decision Directly Conflicts with Decisions by Other Circuits

Plaintiff asserts that there is no conflict among the Circuits as to the meaning of the statutory term "willfully" in section 1681n(a) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681n(a). Plaintiff is wrong: the Ninth Circuit specifically acknowledged that its ruling that willfulness under section 1681n(a) encompasses reckless disregard directly conflicts with decisions by other Circuits holding that willfulness requires a knowing and intentional violation of the statute. *See* Pet. App. at 54 n.17. This conflict among the Circuits is clear and significant and warrants immediate resolution by this Court.

Plaintiff claims that there is no conflict because the conflicting decisions cited by State Farm address different paragraphs and subparagraphs of section 1681n(a). Opp. at 15-18. In fact, all of the conflicting decisions address precisely the same statutory language, namely the general language of section 1681n(a), which introduces and is grammatically completed by the following paragraphs and subparagraphs. That language – "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of" – and its use of the word "willfully" is the language at issue in both the Ninth Circuit's decision and the conflicting decisions of other Circuits cited by State Farm. The paragraphs and subparagraphs that follow this language merely set forth the kinds of damages (actual, statutory, punitive and attorney's fees) to which a plaintiff may be entitled, provided that the plaintiff proves a willful failure to comply. Contrary to Plaintiff's contentions, the fact that the cases involve claims for damages under different subparagraphs does not negate the clear conflict as to the

meaning of the word "willfully."

Thus, Plaintiff's contention (Opp. at 15) that the Ninth Circuit's decision does not conflict with the Eighth Circuit's decision in *Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. 2002), because the plaintiff in that case was alleging a claim for damages under subparagraph (B) of section 1681n(a)(1), while Plaintiff here is alleging claims for damages under subparagraph (A), is meritless.[1] The two decisions address the meaning of the word "willfully" as used in the introductory language under section 1681n(a) and reach directly conflicting conclusions. As the Ninth Circuit acknowledges, it has defined "willfulness" to encompass "reckless disregard," whereas the Eighth Circuit "has rejected the reckless disregard standard" and "'requires knowing and intentional commission of an act the defendant knows to violate the law.'" Pet. App. at 53-54 & n.17 (quoting *Phillips*, 312 F.3d at 370).

Equally meritless are Plaintiff's attempts to minimize the clear conflict between the Ninth Circuit's decision and the decisions by the Second, Fourth, Fifth, and Seventh Circuits cited by State Farm. *See* Pet. at 21-22. Plaintiff contends that the decisions from those other Circuits address willfulness "in the context of resolving a claim for punitive damages under section 1681n(a)(2)." Opp. at 17. As with *Phillips*, those decisions also address precisely the same statutory language under section 1681n(a), which introduces and is applicable to all the paragraphs and subparagraphs under subsection (a), including paragraph (a)(2) of section 1681n, which authorizes an award of punitive damages, and subparagraph (a)(1)(A), at issue in this case, which authorizes

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[1] Likewise, Plaintiff incorrectly attempts to distinguish certain conflicting cases, including *Duncan v. Handmaker*, 149 F.3d 424 (6th Cir. 1998), as involving § 1681q of the FCRA, rather than § 1681n. *See* Opp. at 15-16. In fact, *Duncan* addresses noncompliance with the requirements of § 1681q as a "basis for civil liability under § 1681n" and states that the "knowingly and willfully" requirement of § 1681q "comports with the language of § 1681n, which imposes liability for 'willful noncompliance' with the FCRA." *Duncan*, 149 F.3d at 429. The Ninth Circuit acknowledged that its decision conflicts with Sixth Circuit's implicit requirement in *Duncan* that actual knowledge is necessary. *See* Pet. App. at 54 n.17.

statutory damages.

In short, Plaintiff's argument that there is no conflict because the cases cited by State Farm "fail to interpret the particular text of subsection 1681n(a)(1)(A)" (Opp. at 16) and Plaintiff's reference to "Section 1681n(a)(1)(A)'s use of the term 'willful'" (Opp. at 18) are inaccurate and misleading. The term "willful" (or more accurately, "willfully") does not occur in subparagraph (a)(1)(A) or in any other subparagraph or paragraph under section 1681n(a). It occurs only in the general introductory language directly under subsection (a). *See* Pet. App. at 20.

In addition, contrary to Plaintiff's contentions (Opp. at 17), when the Fifth Circuit in *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), addressed the meaning of willfulness "under the plain language" of section 1681n, it was addressing precisely the same language addressed by the Ninth Circuit in this case – which is the sole instance of the word "willfully" in section 1681n. *See Pinner*, 805 F.2d at 1263. The fact that *Pinner* arose in the context of a punitive damages claim does not limit the relevance of its interpretation of "willfulness" under section 1681n to punitive damages cases. Moreover, the Fifth Circuit in *Pinner* did not (as Plaintiff claims) base its definition of willfulness "on the requirements for proof of punitive damages under section 1681n(a)(2)" or suggest in any way that the willfulness requirement for civil liability under section 1681n differed depending on whether the plaintiffs sought statutory damages under subparagraphs (a)(1)(A) or (B), punitive damages under paragraph (a)(2), or attorneys' fees under paragraph (a)(3). *See also Wantz v Experian Info. Solutions*, 386 F.3d 829, 833-34 (7th Cir. 2004) (addressing meaning of "willful noncompliance"); *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003) (quoting statutory language). Furthermore, contrary to Plaintiff's contention (Opp. at 16-17), the fact that some of these cases follow established Circuit precedent as to the meaning of willful noncompliance, rather than providing a detailed statutory interpretation, does not diminish or obviate the conflict between the Circuits.

Plaintiff also incorrectly argues that there is no conflict between the Circuits because there is no significant difference

between the "conscious disregard" standard adopted by the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, and the "reckless disregard" standard adopted by the Ninth and Third Circuits. *See* Opp. at 18-19. Both the Ninth Circuit in this case (*see* Pet. App. at 54 n.17) and the Eighth Circuit in *Phillips* make clear that the difference is significant. *See Phillips*, 312 F.3d at 368 (listing cases adopting the "conscious disregard" standard; stating that "[u]nder this formulation the defendant must commit the act that violates the Fair Credit Reporting Act with knowledge that he is committing the act and with intent to do so, and he must also be conscious that his act impinges on the rights of others"; contrasting the Third Circuit's "reckless disregard" standard in *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226-27 (3rd Cir. 1997)).

In short, the substantial and significant conflict among the Circuits as to the meaning of willfulness under the FCRA merits resolution by this Court. Moreover, in addition to the cases, including this one, to which the Ninth Circuit has made its decision in *Reynolds* directly applicable, other large putative class actions alleging claims under the FCRA are pending in other jurisdictions across the country. *See* Pet. at 22-23. Thus, the conflict to be resolved not only is "fundamental to the further conduct of" this and other cases decided in the Ninth Circuit, *see Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947), but also is central to many other litigations.

Plaintiff attempts to diminish the importance of this conflict, asserting that section 1681m of the FCRA, 15 U.S.C. § 1681m, has been amended to abolish prospectively the private right of action for failure to provide the required adverse action notice. *See* Opp. at 3, 26. Assuming that the amendment indeed has this effect (and State Farm believes it does), section 1681n will still continue to apply to numerous other types of noncompliance with the requirements of the FCRA. Accordingly, the Circuit conflict on the meaning of willfulness remains a live and significant controversy that will affect not only this case and the other cases ruled upon by the Ninth Circuit, but future litigations as well.

B. The Ninth Circuit Clearly Erred in Its Interpretation of the Statutory Term "Willful"

Plaintiff argues that certiorari should not be granted because the Ninth Circuit's statutory interpretation is "firmly grounded in the statutory language." Opp. at 12-14. Again, Plaintiff is in error. As shown in State Farm's Petition, the Ninth Circuit's extension of willfulness to include "reckless disregard" is inconsistent not only with subsection 1681n(a) as a whole, but with the structure of penalties established under the FCRA. *See* Pet. at 23-27.

Plaintiff's reliance upon cases construing other, different statutory language (Opp. at 14) does not support Plaintiff's and the Ninth Circuit's interpretation of the statutory language here. Contrary to Plaintiff's contentions, there is no "standard statutory definition for willful." Rather, as this Court has repeatedly cautioned, the word "willfully" is "'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998). Used in statutes, the word "'often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental.'" *Id.* at 191 n.12 (citation omitted). Thus, for example, in *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998), this Court looked to the specific statutory language of section 523(a)(6) of the Bankruptcy Code in rejecting an interpretation of "willful" as including "reckless" and holding that "willful" meant "deliberate or intentional."[2]

As shown in State Farm's Petition (Pet. at 25), a "reckless

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[2] Plaintiff attempts to distinguish *Kawaauhau* on the erroneous ground that the statutory language in which the word "willful" is found is different from the statutory language here. *See* Opp. at 14 n.6. State Farm cited that decision, however, as demonstrating that, contrary to Plaintiff's contentions and the Ninth Circuit's analysis, there is no fixed and established rule that the word "willful" in civil statutes includes the meaning "reckless" and that this Court has recognized, whether with regard to criminal or civil statutes, that the word "willfully" must be construed with regard to the specific statutory context. *See* Pet. at 23-24.

disregard" standard is incompatible with, *inter alia*, the language of subparagraph (a)(1)(B), which authorizes statutory damages for willfully obtaining a consumer report "knowingly without a permissible purpose." 15 U.S.C. § 1681n(a)(1)(B). Plaintiff contends that the use of the word "knowingly" in subparagraph (a)(1)(B) would be "superfluous" if the word "willfully" itself required a "knowing" violation. Opp. at 13. As such, Plaintiff argues, a "merely willful" violation "requires something less than proof of a willful and knowing violation." *Id.* To the contrary, *willfully* "obtaining a consumer report under false pretenses or knowingly without a permissible purpose" under subparagraph (a)(1)(B) clearly is a more serious violation and entails a higher degree of fault than "obtaining a consumer report . . . under false pretenses or knowingly without a permissible purpose" in a non-willful manner – a violation that is covered in 1681n(b). Thus, as used to modify "obtaining a consumer report . . . knowingly without a permissible purpose," "willful" must mean purposeful, callous, deliberate and intentional.[3] *See* Pet. at 25-27. Under established principles of statutory construction, which Plaintiff does not distinguish or dispute, "willful" must have that same meaning when read in conjunction with the other paragraphs and subparagraphs of section 1681n(a). *See* Pet. at 25-26.

In addition, Plaintiff's attempt to place "willful" noncompliance lower on the culpability scale than "knowing" noncompliance is inconsistent with the FCRA's authorization of punitive damages for willful noncompliance under section 1681n(a), and not for knowing noncompliance under section 1681n(b).[4] Moreover, the use of the term "willful" in con-

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[3] The occurrence of the phrase "knowingly and willfully" in sections 1681q and 1681r, *see* 15 U.S.C. §§ 1681q, 1681r, further confirms that "willfully" under the FCRA means deliberately and purposefully, not simply recklessly.

[4] Plaintiff erroneously contends that because she is not seeking punitive damages, the meaning of willful in relation to paragraph (a)(2) is irrelevant. *See* Opp. at 17-18. Paragraph (a)(2), however, is directly connected grammatically to the statutory language whose interpretation is at issue and elucidates the meaning of that language. *See* Pet. at 25; 15 U.S.C. 1681n(a) (Pet. App. at 20).

junction with punitive damages indicates that Congress contemplated a higher degree of fault than that urged by Plaintiff and adopted by the Ninth Circuit. As this Court has stated, punitive damages serve the same purpose as criminal penalties. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). Therefore, some of the same considerations that have prompted this Court to interpret the term "willful" in certain criminal statutes as requiring knowledge of unlawfulness, purposefulness or other heightened culpability are equally relevant here. *See, e.g., Bryan*, 524 U.S. at 193-95 (holding that with respect to conduct "that is only criminal when done 'willfully'" the defendant must have "acted with knowledge that his conduct was unlawful"; stating that when individuals are engaged in "apparently innocent" conduct, willfulness may be held to require knowledge that the conduct violated a specific statute).

C. The Issue of Willfulness Is Properly Before this Court in this Case

Plaintiff erroneously contends that the meaning of the statutory term "willfully" is not preserved for this Court's review in her case, claiming that State Farm "acknowledges that the willfulness issue was not decided below in its case." Opp. at 19. To the contrary, the issue of the legal standard to be applied to determine willfulness was decided by the Ninth Circuit in *Reynolds*, and that ruling was incorporated into its decision in this case. *See* Pet. App. at 24 (remanding "all remaining issues to the district court for consideration in light of [*Reynolds*]"). Thus, the Ninth Circuit made its ruling on willfulness equally applicable to State Farm as to the other insurance companies before the Ninth Circuit.[5] Moreover, State Farm raised the issue of willfulness in its motion for summary judgment in the district court. The fact that willfulness issues were not passed upon by the district court in this case does not affect this Court's plenary authority to

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[5] Accordingly, State Farm's petitions for rehearing in the Ninth Circuit included the issue of willfulness. In any event, given that Ms. Willes is represented by the same counsel that represented the other plaintiffs in the cases before the Ninth Circuit, and her counsel fully briefed the issue of willfulness to the Ninth Circuit, none of the concerns protected by the rules of waiver are implicated here.

review the Ninth Circuit's decision on willfulness. *See Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (ruling on issue addressed *sua sponte* by Eighth Circuit; "[a]ny issue 'pressed or passed upon below' by a federal court" "is subject to this Court's broad discretion over the questions it chooses to take on certiorari"); *United States v. Williams*, 504 U.S. 36, 41 (1992) ("'pressed or passed upon'" rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon").

In sum, the Ninth Circuit's decision presents a direct and substantial conflict between the Circuits regarding the statutory interpretation of the word "willfully" in section 1681n(a) of the FCRA. This Court should grant certiorari to resolve that conflict and to correct the Ninth Circuit's erroneous interpretation and application of section 1681n.

II. THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE FCRA'S DEFINITION OF "ADVERSE ACTION" WARRANTS A GRANT OF CERTIORARI

In her opposition, Plaintiff does not dispute the facts of her purchase of State Farm Fire insurance. As set forth in State Farm's Petition, Plaintiff inquired about State Farm insurance and described her driving record to a State Farm agent, received quotes for State Farm Fire auto insurance without any use of her credit information, and submitted applications for State Farm Fire insurance for her three cars. She was approved for and received State Farm Fire insurance at the quoted price. *See* Pet. at 2-4. Plaintiff's credit information (incorporated into her insurance "underwriting score") was not used until after she applied for State Farm Fire insurance. The premium charged was not changed because of her credit rating. *See id.* Had Plaintiff's insurance score been better, she might have qualified for an exception to State Farm Mutual's normal requirement that applicants for insurance not have had a recent speeding ticket. *See id.* As State Farm showed in its Petition (at 12-20), the Ninth Circuit disregarded the plain meaning of the FCRA's definition of adverse action in ruling that, under these facts, both State Farm Fire and State Farm Mutual had, based upon Plaintiff's credit

rating, "increase[d]" the "charge for insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B).

In her opposition, Plaintiff sidesteps the serious issues of statutory interpretation raised by the Ninth Circuit's erroneous ruling. Plaintiff provides no statutory analysis that could support a reading of the statutory language broad enough to allow the conclusion that Plaintiff "applied for" insurance with State Farm Mutual or that State Farm Fire was somehow responsible for an "increase" in the charge for Plaintiff's insurance by virtue of the fact that Plaintiff was not offered a State Farm Mutual auto policy. To the contrary, as shown in State Farm's Petition (at 13-17), the words "applied for" must refer to an actual application for insurance, not a request for quotes or an expression of interest in obtaining insurance.

Plaintiff in her opposition does not (and could not) dispute the facts that State Farm Fire's initial quote was not based on a consumer report and that the price quoted was not increased. Instead, Plaintiff quotes the irrelevant and erroneous statement from the FTC's *amicus* brief before the Ninth Circuit, that it would be "absurd" to hold that there can be no increase in a charge for an initial policy of insurance unless there had been an increase from the charge originally offered, because "it assumes that an insurer would make a formal offer of insurance to a consumer and then, after making that offer, would evaluate the consumer's insurability." Opp. at 28 (quoting Br. of FTC as *Amicus Curiae* Supporting Appellant and Urging Reversal at 14, *Willes v. State Farm Fire & Cas. Co.*, No. 03-35848 (9th Cir. Feb. 19, 2004)).

The FTC's statement shows a misunderstanding of the process by which an insurance contract is formed. A quote is not a "formal offer of insurance." Rather, the blank insurance application is the insurer's invitation to the consumer to make an offer to contract, and submission of the completed application by the consumer is an offer to contract, which the insurer after investigating the applicant may accept or decline or respond to with an offer of insurance on different terms. *See* 1A Lee R. Russ et al., *Couch on Insurance* §§ 11:1, 11:3, 13:3 (3d ed. 2005). Thus, far from being "absurd" for an insurer to evaluate the consumer's insurability after a quote is provided and the consumer completes and

submits his or her application, that is precisely the process that typically occurs – and is the process that occurred in this case. Under the statutory language, in this process, it is an insurer's decision, based upon a consumer report, to accept or deny the applied for insurance or to offer the applied for insurance on different terms or at a different price that may constitute an adverse action. In this case, however, State Farm Fire gave its original quotes without reference to any consumer report and, after accessing Plaintiff's insurance underwriting score in connection with the application process, State Farm Fire did not increase the price quoted. If in processing Plaintiff's application, State Farm Fire had increased the price quoted based upon Plaintiff's credit information, that action would fall within the definition of "adverse action" and a disclosure notice would have been required. It is that limited scenario which is contemplated under the plain meaning of the statutory language with respect to increases in the charge for insurance that has been "applied for."

The Ninth Circuit's interpretation of "adverse action" erroneously requires notice "whenever a consumer pays a higher rate because his credit rating is less than the top potential score." Pet. App. at 43. That overbroad notice requirement not only is contrary to the "ordinary or natural" meaning of the statutory language, but also undermines the statutory purposes and congressional intent that informed the careful and deliberate selection of that language.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] *See, e.g., The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Commission on Banking, Housing, and Urban Affairs*, 108th Cong., 529 (2003) (testimony by Joel Winston, Associate Director, Bureau of Consumer Protection: "[W]e want to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate."); *id.* at 95-96 (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection: "[I]f you give notices too widely and in too many circumstances, then it . . . . becomes something that people ignore.").

Respectfully Submitted,

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